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Seeing the Forest Through the Trees: Thinking Critically about Mental Health Courts

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Seeing the Forest Through the Trees: Thinking Critically about Mental Health Courts

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The almost universal acceptance of the problem-solving court concept by both the courts and the academic community provides a good example of the hazards of the bandwagon effect on the development of public policy. The proponents of therapeutic jurisprudence have successfully promoted the adoption of these programs by repeating and then having others repeat a mantra of success that grossly belies reality and ignores the compelling issues they raise. Not surprisingly, this has led to the development of an extensive bureaucracy fueled almost entirely by federal money and encouraged by cheerleaders entrenched in the self-serving subculture of therapeutic jurisprudence.

Unfortunately, mental health courts, like other problem-solving courts and, in particular, drug courts, have proliferated as one more proposed panacea for solving complex behavioral problems despite only the most limited debate. In this essay, it is my intention to promote a more thoughtful and searching discussion of mental health courts and the important issues they raise that go to the very heart of the American justice system and its place in the larger political structure. Moreover, I suggest that the questions they present are largely applicable to other problem-solving court initiatives, such as drug courts, that share a common conceptual framework and similar operational features.

I. WHAT DO MENTAL HEALTH COURTS TRY TO ACCOMPLISH?

In order to discuss mental health courts, it is necessary to have a clear understanding of the exact nature of the problem that they try to solve. The name “mental health court” is mis-

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leading. The actual problem in a mental health court is not mental illness, but crime. People end up in mental health court because they committed, or are accused of committing, a crime, and because at some point in the criminal process it was suggested that mental illness led to the criminal act. Thus, the court is really trying to address crime, and the solution is perceived to be mental health treatment.¹ This is a simple but most important distinction because it tells us something about the criteria for determining whether these programs actually work.

The next question has to do with what it is about a mental health court that equips it to respond to the mentally ill criminal any better than other alternatives. The answer most commonly suggested is the availability of a judge as the rule enforcer. In reality, this refers to the ability of the judge to force defendants to comply with the requirements of conventional mental health treatment, and in particular the taking of drugs. Drug courts and mental health courts follow a very similar, if not identical, approach. While there are no uniform or standardized legal rules or criteria for operating a mental health court, and though there is considerable diversity among them, they commonly include the following features:²

1. They offer charged or convicted offenders who are mentally ill the opportunity to avoid incarceration and perhaps, depending on the program, a criminal conviction.

2. Eligibility requirements for participation and admission into the program are discretionary. These requirements may include such things as the absence of a prior criminal record (or of a certain kind of record), an appropriate mental health diagnosis, amenability to treatment, and a pending or resolved charge that did not include violence.

¹ Susan Stefan & Bruce Winick, Dialogue on Mental Health Courts, 11 PSYCHOL. PUB. POLY & L. 507 (2005) (describing the notion that for the mentally ill criminal behavior is more a function of illness, and he or she is more in need of treatment than punishment).

3. They are judge-centered in that they rely on a judge to monitor compliance with program requirements and respond accordingly.

4. They facilitate access to mental health treatment that is available in the local community.

5. They use rudimentary principles of operant conditioning, largely through a program of contingency management, to get mentally ill offenders to follow the treatment and behavioral requirements of the program.

6. They use treatment teams that typically include the judge, the defense attorney, the prosecutor, the probation officer, and one or more service providers to plan and review the offender’s progress.

7. They require frequent, regular appearances before the judge who is expected to respond to offenders by either rewarding or punishing them, as their behavior requires.

8. Incarceration is used as a sanction for rule violations.

Access to treatment is thought to be at the heart of the mission of problem-solving courts and is a central tenet of therapeutic jurisprudence, the philosophical orientation upon which these courts are generally based. Concomitantly, there is an ongoing effort to assure that participants actually take advantage of the treatment that is offered and otherwise follow rules thought necessary for a successful therapeutic intervention. In mental health courts, like drug courts, the need for treatment is considered critical to the success of the program. As such, there is a concerted effort to motivate offenders to follow treatment recommendations, including taking prescribed psychotropic drugs.

The way that this is accomplished is through a system of contingency management, a strategy based on principles of learning theory—and more precisely operant conditioning—first developed by noted behaviorist B.F. Skinner in the early 20th century. Simplistically, this means that particular behavior is either rewarded or punished. Specifically, consequences either positive or negative are contingent on the occurrence of identifiable behavior. In the context of mental health, drug, and certain other specialty courts, this typically plays out by having the judge, with the support and participation of the treatment team, either punish or reward a defendant in a timely fashion following specified behavioral events. For example, a defendant may have to go to jail or have his or her liberty somehow restricted for missing a drug screen or failing to take psychotropic medication.

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while a defendant who follows the rules may be rewarded by receiving public recognition or a gift.\(^5\) Although it is a conceptually and functionally simple strategy as practiced by problem-solving courts, its theoretical basis is far more involved and the application of operant learning principles can be quite complex.\(^6\) It must be also noted that operant conditioning strategies have had a considerable history in correctional settings.\(^7\)

II. WHAT IS WRONG WITH MENTAL HEALTH COURTS?

The very idea of creating a court process that is limited to cases that involve people who are labeled mentally ill says a great deal about the current limitations of psychiatry, psychology, and the mental health system to effectively treat the mentally ill; in particular, mentally ill criminal offenders. It also indirectly speaks to the compelling yet entirely understandable need of many judges to either conclude that their role in the justice system should be defined more broadly to encompass a kind of therapeutic orientation or to simply look for ways to be more successful in addressing the kind of dysfunctional and troubling behavior they see so frequently. The same can be said, more or less, about any of the “problem-solving” court initiatives.

The effective treatment of mental illness is a critically important component of a community’s health care system, and should be strongly encouraged by those in the justice system who frequently see individuals in urgent need of it. That mental health courts try to promote such treatment should be applauded.

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6 For a basic yet comprehensive description of the principles of operant learning, see, Jon L. Williams, OPERANT LEARNING: PROCEDURES FOR CHANGING BEHAVIOR (1973). Understanding the fundamental principles of operant conditioning is necessary to accurately assess the potential efficacy of any behavioral change programs like problem-solving courts that claim to systematically use reward and punishment as a change strategy.

7 The use of operant principles, or more accurately, the applied science of behavior modification was very popular in the correctional system as early as the 1960’s. It was the subject of considerable controversy largely because of the use of what problem solving courts refer to as sanctions. Programs that utilized aversive conditioning that incorporated often severe forms of punishment were the subjects of legal attacks including court challenges. For a description of the types of strategies used, see Charles H. Bishop & Edward B. Blancharde, Behavior Therapy: A Guide to Correctional Administration and Programming (1971). For a description of a program that systematically and quite successfully applied an operant conditioning model in a juvenile correctional setting, see Harold L. Cohen & James Filipczak, A New Learning Environment (1971). For a comprehensive description of the legal issues associated with the use of behavior modification strategies, see Reed Martin, Legal Challenges to Behavior Modification: Trends in Schools, Correction and Mental Health (1975).
ed. The subject of concern is not, in my view, their mission. Rather, it is the execution of that mission that raises issues of compelling practical and legal significance.

A. They Are Not a Necessary and Efficient Means of Accomplishing Their Objectives

For judges who must commonly deal with a myriad of individuals, often in very sad and sometimes tragic circumstances, who seem to be struggling in almost every aspect of daily living, the prospect of helping them solve their problems can be quite compelling. This is particularly true with regard to the mentally ill, whose presence in the justice system has seemingly increased dramatically. That jails and prisons have become the dumping ground for the seriously mentally ill who have not received adequate or successful treatment in the mental health system is well documented. This has been occurring for almost fifty years, paralleling both the movement to close mental institutions and the accelerated use of psychotropic drugs to manage behavior in the community. What has not been fully appreciated is the challenge these developments have presented to trial judges. Yet, it is this reality that has prompted many judges to embrace the notion that courts are somehow better equipped to do what the mental health system and the community-at-large have failed to do. However, shifting this responsibility to the court system, and in particular to the judge, is a very risky proposition that may in the long term have very negative consequences for the justice system, the mental health system, and the political system generally. Whether it is worth the risk is a most compelling question.

8 The Council of State Government, Estimates on the Prevalence of Adults With Serious Mental Illnesses in Jails (2009), available at http://consensusproject.org/jc_publications/council-of-state-governments-justice-center-releases-estimates-on-the-prevalence-of-adults-with-serious-mental-illnesses-in-jails/MH_Prevalence_Study_brief_final.pdf (reporting on a five-year study that found that people with serious mental illnesses comprise 16.5% of five jail populations); see also, Nami Pennsylvania, Prisons and Jails: The New Mental Treatment Centers, The Alliance (Special Edition, 2009) (describing the increased proportion of mentally ill inmates in Pennsylvania prison and jails and the need for the availability of treatment). This edition also relates the findings of a U.S. Department of Justice study that noted the increased risk of the mentally ill for incurring serious difficulties in the community. Id. at 2.

9 Leroy L. Kondo, Advocacy of the Establishment of Mental Health Specialty Courts in the Provision of Therapeutic Justice for Mentally Ill Offenders, 28 AM. J. CRIM. L. 255, 270 (2001) (describing the need for mental health courts in light of the large numbers of mentally ill offenders housed in jails and prisons and generally pointing to the practical and justice imperatives for their development).

Assuming that mental health courts provide a model for effective behavior modification, the question is whether the same results can be accomplished without the need to fundamentally alter the judiciary’s traditional role as an independent adjudicator and guardian of the rule of law. From the onset of this discussion it is critical to acknowledge that mental health courts do not provide individuals with access to any new or unusually effective form of treatment. Instead, they can only offer treatment opportunities that are otherwise available in the local community. In turn, mental health providers in the community can only offer treatment that the present scientific knowledge of human behavior supports. If the treatment doesn’t work in the community, it won’t work any better if carried out in the context of the court system.

Most significantly, I maintain that direct and ongoing judicial involvement is not required for the effective use of the principles of operant conditioning. The dissemination of rewards and punishments can be done by anyone who has the practical ability to do so. In the court system, or more broadly speaking, the justice system, probation officers—and perhaps parole officers—are not only capable of doing it but are in a better position to do so, for they are on the front line of supervising offenders in the community. They have arrest powers and therefore the authority to incarcerate offenders thought to be in violation of the conditions of release. They can be delegated authority to do all sorts of things related to the supervision of offenders that can affect the offender’s quality of life in the community. In addition, they are much better positioned to distribute consequences in a manner consistent with the requirements of operant learning theory, including utilizing more carefully constructed and precisely executed schedules of reinforcement and punishment.

The practical ability to structure a program whereby probation officers play a more prominent role was demonstrated in a rudimentary study in Erie County, Pennsylvania, where the court adopted a model for rule enforcement that required the de-
livery of an aversive consequence for any violation of the conditions of probation.\textsuperscript{14} While the use of graduated sanctions in correctional programs has been noted for a considerable time, the Erie County program demonstrated the feasibility of giving probation officers a more prominent role in rule enforcement and the direct distribution of sanctions.\textsuperscript{15} The results of this initiative indicated the feasibility of specifically relying on, and indeed expecting, probation officers to impose sanctions for rule violations. The initiative did not incorporate other key features of the drug court model, nor did it utilize a reinforcement-based strategy, which I suggest is a major limitation. However, it did have very positive results with regard to discouraging violations of the conditions of community supervision and generally affirmed the notion that probation officers can be effective rule enforcers.\textsuperscript{16} Moreover, specialty caseloads for mentally ill offenders have been a part of the probation landscape for some time. They are characterized by limited caseload size and the assignment of probation officers who are oriented to the particular problems of mentally ill probationers.\textsuperscript{17}

The challenge is to actually put in place an organizational scheme that supports the use of operant conditioning in a probation setting and, most importantly, to properly manage it. While one would be hard pressed not to acknowledge that this will require an unusual level of administrative commitment and judicial and executive branch leadership, it is a challenge that can be successfully embraced if the underlying concepts of the problem-solving-court model truly have merit. It is easy to understand why using judges as consequence dispensers is so attractive: they can give orders and make things happen with a certain amount of immediacy and are perceived to be powerful enough to make good on their promises. It is far easier to get the judge involved than to actually go through the effort of properly managing the probation or other correctional function to effectuate change. It is also much easier than reforming the mental health system. Unfortunately, this strategy is short-sighted and under the best

\textsuperscript{16} Mercyhurst, supra note 14.
\textsuperscript{17} Jennifer Skeem & John Petrila, Problem-solving Supervision: Specialty Probation for Individuals with Mental Illness, 40 Ct. Rev. 8 (2004) (describing the development of specialty caseloads in probation departments and the special ability of probation officers to bring a problem-solving perspective to their work with mentally ill probationers. They also note their tendency not to emphasize the use of sanctions).
of circumstances can only have a minimal impact on the overall rate of crime.\textsuperscript{18}

Of course, the issue in the end is whether the program works to solve the problem at hand regardless of who is acting in a therapeutic capacity. As Dean Richard Redding pointed out in a recent article introducing the Chapman Journal of Criminal Justice’s last symposium’s issue on evidence-based sentencing, the historical failure of rehabilitation strategies has been well documented.\textsuperscript{19} In my view, the past failure of rehabilitation strategies should not be a barrier to continuing efforts to change criminal behavior by using positive means. Rather, it should serve to motivate the criminal justice community to be cautious in embracing any new strategy as an answer to the complex problem of crime.\textsuperscript{20} The failure to do so may lead to yet another crisis in public confidence in the court system, resulting in the blanket rejection of any attempts to change offender behavior beyond the use of incarceration. There will be no meaningful discussion of “therapeutic jurisprudence” or solving the personal problems of criminals while the fear of crime is pervasive.

This raises the question as to why there is currently such seemingly broad receptivity to the whole idea of problem-solving courts. I believe that it is at least in part because crime as a social problem has moved to a more obscure position on the radar screen of middle-class America. Serious crime is at historically low levels, notably without any meaningful contribution from problem-solving courts.\textsuperscript{21} The Bureau of Justice Statistics reports that between 1992 (the year of the highest historical rate reported by the FBI’s Uniform Crime Report) and 2005, violent crime decreased by twenty-eight percent. It also reported that property crime rates decreased by fifty-six percent between 1991

\textsuperscript{18} Bozza, supra note 12, at 141–42 (noting the relatively small number of offenders who are involved in drug courts when compared to probation).


\textsuperscript{20} One of the consequences of this historical failure was the increased reliance on incarceration to respond to criminal behavior. This was in part the result of often exaggerated claims about the effectiveness of these programs. Program evaluations at that time were anything but scientific. While unrealistic expectations persist with regard to problem-solving courts, current research efforts to evaluate programs have improved greatly. Across the spectrum of drug court evaluations there have been significant efforts to recognize the limitations of evaluative studies and to temper claims of success particularly with regard to curbing criminal behavior. This should be applauded.

\textsuperscript{21} Even with the most generous estimate of the number of specialty courts currently operating, as well as the most optimistic view of their performance, their impact on crime would not be close to the actual reduction in serious crime experienced over the past fifteen to twenty years. See generally, John A. Bozza, Judges, Crime Reduction and the Role of Sentencing”, 45 THE JUDGES J. 22 (Winter 2006) (describing the relationship between sentencing decisions, incarceration rates, and other factors on falling crime rates).
and 2005. Recent data reflects the continuing decline in rates of serious crime, particularly crimes of violence. Moreover, the incarceration rate in state prisons during the same general period increased by fifty-six percent, establishing an all-time high in the number of incarcerated offenders and costing huge sums of public money. Such data indicates that this is a very good time to be talking about a better, or at least a different, approach. On the other hand, should the lay of the land dramatically shift—for example, if homicide or other violent crime rates return to levels seen in the early 1990’s—all bets are off and few will care to hear about any crime strategy that incorporates the word therapy. The current receptivity to the problem-solving approach reflects a public that is less concerned about crime and that is more receptive to try new rehabilitative strategies, even where objective success is only marginal. Of course, what is considered to “work” in the world of corrections is at any given point in time a relative determination.

It has often been asserted that drug courts, and to a lesser degree mental health courts, do a better job of reducing recidivism than conventional correctional strategies. However, what is suggested by studies of drug courts and mental health courts is at most that some programs seem to reduce the likelihood of recidivism to some degree for a limited number of offenders. As noted researcher Douglas Marlowe, Ph.D has observed, the best studies indicate that for high-risk offenders who have a serious drug problem, drug courts on average reduce recidivism by ten to fifteen percent. Other than that, the results are marginal. The results are even less definitive with respect to mental health courts. Dr. Marlowe has observed that the verdict is still out on their effectiveness in reducing criminal behavior.

It needs to be noted that Dr. Marlowe and a number of other researchers have done an outstanding job trying to bring empirical discipline to the evaluation of problem-solving courts, and in particular drug courts.

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a noted authority on mental health courts, has related that the available evidence concerning their impact on recidivism does not provide a definitive answer. Significantly, Professor Petrila notes the importance of not over-promising what it is that they can accomplish.\footnote{Professor John Petrila, University of South Florida, Panelist Presentation at the Chapman Journal of Criminal Justice Symposium: Specialty Courts in Criminal Justice: Challenges and Opportunities, Panel III: Mental Health Courts (Aug. 7, 2009), available at http://www.chapman.edu/law/webcasts (follow “Mental Health Courts” hyperlink).}

It is apparent that these courts have had nothing to do with the astonishing decrease in crime, particularly as to serious crime noted above. With the number of individuals involved in these programs being so miniscule in comparison to the total population of sentenced offenders, any meaningful impact on crime rates is not even remotely possible. Obviously, another factor is responsible for the profound impact on crime, and whatever it is has nothing to do with some new effective therapeutic intervention. Nor, for that matter, has it had anything to do with police making more arrests or solving more crimes or, most noteworthy, judges imposing longer sentences. Such practices have remained essentially unchanged for a long period of time.\footnote{See BUREAU OF JUSTICE STATISTICS, KEY CRIME AND JUSTICE FACTS AT A GLANCE, available at http://www.ojp.usdoj.gov/bjs/glance.htm#Crime.}

The primary development of any real consequence is that the incarceration rate has increased by more than 250 percent since 1980 and some 70 percent since 1990.\footnote{BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, INCARCERATION RATES 1980-2007, available at http://www.ojp.usdoj.gov/bjs/glance/tables/incrttab.htm.}

It is also true that there has been a substantial increase in the number of felony convictions.\footnote{BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, NUMBER OF FELONS CONVICTED IN STATE COURTS (2009), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc09st.pdf.}

Whatever it is that caused more than 10,000 fewer people to be murdered in the United States in 2008 than in 1994, when 24,703 homicides were reported by the F.B.I., should be the subject of far greater research interest among those truly interested in solving the crime problem, rather than the efficacy of mental health and drug courts, which have clearly played no role.\footnote{FEDERAL BUREAU OF INVESTIGATION, 2008 CRIME IN THE UNITED STATES, available at http://www.fbi.gov/ucr/cius2008/offenses/expanded_information/homicide.html; For historical data about homicide, see BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, HOMICIDE TRENDS IN THE U.S., available at http://bjs.ojp.usdoj.gov/content/pub/pdf/htius.pdf. It is even more noteworthy that in some communities the number of homicides declined even more dramatically. In New York City, for example, reported homicides declined by seventy-six percent between 1990 and 2008.}

While the bandwagon effect has resulted in many observers—including a significant number of judges—embracing the
conclusion that these courts “work,” the reality is, if one actually stops to objectively think about it, quite different. There are no experimental studies that demonstrate that crime is reduced by having a judge rather than someone else use an operant conditioning approach to shape the behavior of mentally ill defendants. Assuming that these court programs have some reasonable chance of affecting real behavioral change, accurately evaluating the efficacy of any intervention intended to reduce the future likelihood of criminal behavior is very difficult. What credible results do exist point to the possibility of only a most modest accomplishment. The results of social science research strategies, including comparison studies, must be viewed with caution, because of the difficulty in constructing true experimental designs. It is extremely difficult to incorporate experimental designs that approximate true scientific inquiry into studies of efficacy and recidivism. Seldom does social science research incorporate a double-blind format to minimize the subjective taint of both experimenters and subjects. Nor is it typically feasible to measure the “placebo effect” (i.e., the consequence of folks assigned to the mental health court knowing it is a special effort to help them) of such research. Moreover, controlling for the impact of crucial factors in an ultimately successful community correctional intervention, such as the quality of offender supervision and the idiosyncrasies of supervisors, is very difficult.33

Another reason to doubt that mental health courts will ultimately lead to a meaningful reduction in crime is the reality that, not notwithstanding numerous criminological theories, we know very little about why some people, whether they are mentally ill or not, choose to commit crimes, particularly serious ones, and others do not. More specifically, the causal relationship between mental illness and crime is not at all clear. Indeed, there is no empirical foundation for the notion that mental illness in any generalized sense leads to a greater incidence of criminal behavior. The sheer number of conditions now identified as mental illnesses almost precludes such a determination.34 While it is beyond dispute that individuals who are actively psychotic have a great deal of difficulty conforming their behavior to social norms,

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33 See generally Wolff & Pogorzelski, supra note 2. The authors provide a comprehensive review of the requirements for engaging in scientifically valid studies of the effectiveness of mental health courts. For example, they note the importance of assuring standardization of the interventions that are being measured and compared. Id. at 562.

34 See generally AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed., text rev. 2000) [hereinafter DSM] (DSM is the primary source for diagnostic impressions for mental health professionals. Published by the American Psychiatric Association, it describes hundreds of mental disorders ranging from eating problems and substance abuse to schizophrenia and depression.).
including some criminal rules, there is not much that one can definitively conclude beyond that. And mental health courts do not limit their caseloads to the mentally ill who are at high risk to re-offend in a serious way. In fact, there is no general requirement that restricts participation in mental health court programs to those whose mental illness is causally related to their crime or are seriously struggling to function in the community.35

There is also the threshold question of treatment efficacy for those who find themselves in the criminal justice system and end up in a mental health court. Any trial judge who has spent any time sentencing offenders diagnosed with a serious mental illness will quickly note that treatment largely centers on taking medication. It is not uncommon to see adults and juveniles in the justice system prescribed multiple drugs for a myriad of DSM conditions. In some cases, particularly with severely impaired individuals who often times have schizophrenia, the improvement can appear dramatic. On the other hand, it appears that in the majority of cases the effectiveness of these drugs is generally subtler and largely dependent on how patients report they feel. There is nothing new about trying to control behavior by using drugs. However, it is not at all clear how these drugs work and whether they address the underlying cause of mental illness. Their use and effectiveness is the subject of considerable controversy in the psychiatric world.36 Aside from the common but obviously ambiguous assertion that it is believed that the newer generation of psychotropic drugs work by affecting the brain’s neurotransmitters and correcting chemical imbalances, it is undetermined how they actually work to influence behavior.37

35 COUNCIL OF STATE GOVERNMENTS, BUREAU OF JUSTICE ASSISTANCE, MENTAL HEALTH COURTS: A PRIMER FOR POLICYMAKERS AND PRACTITIONERS 5 (2008), available at http://www.ojp.usdoj.gov/BJS/pdf/MHC_Primer.pdf [hereinafter A PRIMER FOR POLICYMAKERS AND PRACTITIONERS] (noting that the majority of mental health participants are diagnosed with a serious mental illness such as bipolar disorder, schizophrenia, severe depression or anxiety disorder but not necessarily with “profound impairment of functioning”).

36 See Joanna Moncrieff & David Cohen, Analysis, How do psychiatric drugs work?, BMJ 2009;338:b1963 (2009), available at http://www.bmj.com/cgi/content/extract/338/may29_1/b1963, and Psychiatric Drugs, available at http://www.psychiatricdrugs.net/about/ See also Laura Blue, Antidepressants Hardly Help, TIME, Feb. 26, 2008, available at http://www.time.com/time/health/article/0,8599,1717306,00.html (reporting on the results of a research analysis of studies of depression treatments that concluded that commonly prescribed antidepressants such as Paxil and Prozac help only a very limited number of patients and barely perform better than placebos).

37 ASTRAZENECA PHARMACEUTICALS, SEROQUEL XR FOR BIPOLAR DISORDER, available at http://www.seroquelxr.com/seroquel-xr-bipolar-disorder.aspx (providing information from the manufacturers of Seroquel, a leading drug for treating bipolar disorder, indicating that it really does not know how it works); ORTHO-McNEIL-JANSSEN PHARMACEUTICALS, HOW DOES RISPERDAL WORK?, available at http://www.risperdal.com/risperdal/faq_schizophrenia.html#work (indicating that the drug manufacturer does
Moreover, the placebo effect with taking these drugs is substantial. Then there is the serious question whether in many cases they significantly contribute to improvement at all. Without a great deal more progress in understanding and treating mental illness, mental health courts, like drug courts, will be severely constrained in their ability to reach their objectives no matter how many local treatment services are available.

In the end, the real question is not simply whether mental health courts reduce recidivism but whether they do it any better than alternatives using the same behavioral strategies or other alternative strategies. The answer to this question will help determine whether fundamentally altering the court process in ways that compromise the independent role of the court and the judge, as well as the adversarial role of attorneys, is both necessary and worth the risk. While the more measured advocates of problem-solving courts have moved away from wild euphoria and grossly exaggerated assertions of the success of such courts to a more realistic assessment that they seem to work a bit better for some offenders, other advocates maintain their vigor. Unfortunately, some leaders of the parade continue to ignore reality in favor of the relentless pursuit of an agenda fueled by both the inordinate attention they receive from those eager to find the Promised Land and the indiscriminate but truly generous support of the federal government and other funding sources.

In operant conditioning lingo, attention and approval have served as powerful reinforcers for the continued dissemination of an exaggerated and misleading message about problem-solving courts.

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38 AstraZeneca Pharmaceuticals, Seroquel XR is Approved for Bipolar Depression, available at http://hcp.seroquelxr.com/seroquel-xr-efficacy-bipolar-depression.aspx (providing results from studies comparing performance with placebos); see also Wyeth, Pristiq Efficacy, available at http://www.wyeth.com/hcp/pristiq/efficacy?WT.mc_id=1E82F146-6EA5-4912-944E-DB4EA22B3D3D&WT.srch=1&WT.mc_ev=click (relating the results of comparison studies of this anti-depressant, which shows a very high placebo effect).
39 See David Healy, The Latest Mania: Selling Bipolar Disorder, 3 PLoS Medicine 441 (2006), available at http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.0030185 (analyzing the surge in diagnoses of bipolar disorder and the evidence of antipsychotic drugs in certain circumstances). But see Mark J. Edlund & Katherine M. Harris, Perceived Effectiveness of Medications Among Mental Health Service Users With and Without Alcohol Dependence, 57 Psychiatric Services 692, 696 (2006), available at http://psychservices.psychiatryonline.org/cgi/content/full/57/5/692#T4 (relating the findings of an extensive study indicating that seventy nine percent of seriously mentally ill service users who took medication reported at least some improvement compared to sixty-four percent of those who had services without medication).
40 Wolff & Pogorzelski, supra note 2, at 563.
41 Id. at 539 (noting the role of federal funding in the proliferation of mental health courts).
B. They Unjustifiably Promote Jurisprudential Relativism

Any discussion of problem-solving courts must begin with the recognition that these initiatives have largely grown out of the assumption that for some people the criminal process, and perhaps in some circumstances the civil process, should provide special treatment. Therapeutic jurisprudence emerged as a quasi-legal philosophy that espoused the notion that individuals with certain personal problems (such as drug or alcohol addiction) who were accused of committing crimes did not either deserve or require a punitive response from the government, but rather needed some form of treatment. These specialty courts, including mental health courts, largely emerged as delivery systems for change strategies outside more conventional correctional practice. While the concept has morphed into a somewhat broader orientation, with the advent of such initiatives as veterans courts and gun courts, the notion that there is a practical benefit from taking a more benevolent and therapeutic approach to the dissemination of justice remains dominant. Embracing what can be described as jurisprudential relativism represents a departure from the egalitarianism that has been the hallmark of the American legal experience and should be of serious concern to the legal community and society generally.

The notion that justice should be more a function of personal characteristics or special needs than criminal conduct per se is a risky legal and political concept that invites, or perhaps requires, inequality. The prospect of arbitrariness increases dramatically whenever personal attributes become the sine qua non of judicial decision-making. In mental health courts, a person who has been diagnosed as having a mental illness is given special consideration and treated differently than others who are ostensibly—according to some undefined standard—sufficiently well adjust-

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42 This is less true when considering the role of gun courts, homeless courts, community courts or other similar undertakings, which may be more in line with the idea that certain kinds of cases should be dealt with in a particular fashion to accommodate the practical requirements of the case. It has also been observed that problem-solving courts have grown out of much earlier efforts to reform policing into a model more responsive to the needs of the community. ROBERT V. WOLF, CENTER FOR COURT INNOVATION, PRINCIPLES OF PROBLEM-SOLVING JUSTICE (2007), available at http://www.courtinnovation.org/_uploads/documents/Principles.pdf. The increased diversity of these initiatives makes it increasingly difficult to find common denominators other than the fact that they represent a more concerted effort to address what is perceived to be a social or personal challenge. For example, a “sex offense court” seems to operate in such a manner as to maximize both the efficiency and the consistency with which cases are processed, with a seemingly lesser interest in treatment for offenders and more emphasis on control factors. See CENTER FOR COURT INNOVATION, ESTABLISHING A MODEL COURT: A CASE STUDY OF THE OSWEGO SEX OFFENSE COURT (2007), available at http://www.courtinnovation.org/_uploads/documents/a_case_study2.pdf.

43 Kondo, supra note 9.
ed. A thief or drug dealer who is labeled bipolar or clinically depressed will not only receive a more favorable disposition but also a level of benevolent attention that will likely far exceed the norm. Depending on the jurisdiction, formal criminal prosecution may even be withheld and, in most instances, incarceration will be avoided altogether. Problem-solving court participants will likely have a “treatment team” to monitor their progress and respond to their therapeutic and other adjustment needs. Special court hearings will be conducted and judges will give defendants an inordinate amount of individual attention and may even publicly reward them when they do what is expected. The well-adjusted criminal, or perhaps more accurately the defendant who simply never received a mental illness label, may very well not be nearly so lucky. The very same situation occurs in drug court programs.

While the law has long recognized circumstances where mentally ill individuals should be treated differently in the legal process, none of those standards apply to mental health courts. Specifically, there is no requirement that a criminal defendant has to meet the criteria for an insanity defense—or even a diminished capacity defense—to qualify for the special treatment afforded by mental health courts. Indeed, there is no need to determine that the person’s mental illness had anything to do with the propensity to steal or sell drugs. According to the Council of State Government’s survey of mental health courts, less than two-thirds of drug courts limited participation to individuals who had a serious and persistent mental illness or met Axis I criteria. While there are generally criteria to determine eligibility for mental health court participation, there are no standardized eligibility requirements from court to court, making the breadth of possibilities substantial. The question is: Who exactly qualifies for participation in mental health court and the special consideration that goes with it?

The reality of mental health diagnosis is that it is an entirely subjective undertaking that is carried on by a myriad of mental health workers with varying degrees of training and experience.

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44 A PRIMER FOR POLICYMAKERS AND PRACTITIONERS, supra note 35, at 7.
45 COUNCIL OF STATE GOVERNMENTS, BUREAU OF JUSTICE ASSISTANCE, A GUIDE TO MENTAL HEALTH COURT DESIGN AND IMPLEMENTATION (2005), available at http://consensusproject.org/jc_publications/guide-to-mental-health-court-implementation/Guide-MHC-Design.pdf. The “Axis” system is used by mental health professionals of one kind or another to provide a more complete evaluation of client. There are five different levels or axis each relating to a different category of disorder or functioning. The Axis I category specifies “Clinical Disorders,” which includes among many other things: mood disorders, schizophrenia and other psychotic disorders, and sleep disorders. See DSM, supra note 34, at 27–28.
To be identified as having one of the DSM disorders does not require an evaluation from a skilled clinician, and certainly not from a psychiatrist. Indeed, the standards can be surprisingly low. In the very recent past in this observer’s jurisdiction, it was common to have defendants who had been referred for mental health services by the probation department, after being evaluated over the phone on the basis of a standardized interview not conducted by any kind of mental health professional. This frequently resulted in a person being diagnosed as having a serious mental illness—and therefore eligible for government-funded treatment. On the basis of anecdotal reports, I am confident that many trial court judges are now very much aware of the ease with which individuals are diagnosed as having bipolar illness or major depression and prescribed medication. A recent study published in the Journal of Clinical Psychiatry called attention to this development.

While there is broad consensus in the mental health community that mental disorders are the result of “illness,” diagnosing mental illness is nothing like diagnosing tuberculosis or cancer. There is no foreign organism to be identified and no structural abnormality to recognize. While observation may tell us that someone is behaving in a manner different, perhaps markedly so, from what is to be expected by cultural norms, that such behavior is indicative of a particular pathological anomaly is entirely a subjective determination. As such, advocates for mental health courts must be very mindful of the very real and ongoing difficulty in accurately diagnosing mental illness, and the challenge of selecting those who should receive special treatment in the justice system. If the justification for this special treatment is the need to help those who, through no fault of their own, have a disease that causes them to commit crimes, then it would be critical to make sure that you have captured the right people in your problem-solving court.

This is not to suggest that consideration of personal and social traits is never appropriate in the criminal process. Indeed, notwithstanding the proliferation of mandatory sentences, the sentencing decision is still largely a function of judicial discretion, and judges must pay attention to personal and social background information in light of established sentencing objectives.

46 Healy, supra note 39, at 442–444.
48 Kyung Song, Diagnosis of Mental Illness Hinges on Doctor as Much as Symptoms, SEATTLE TIMES, October 22, 2003, available at http://community.seattletimes.nwsource.com/archive/?date=20031022&slug=diagnosis22c0.
when fashioning a proper sentence. However, mental health courts and other problem-solving courts treat an entire class of criminals differently solely on the basis of having an appropriate mental health or other relevant diagnosis with little or no regard for its severity, its effect on the functioning of the offender, the actual role it played in the perpetration of the crime, and perhaps its accuracy. Importantly, the difference in response is not a small matter. As a class, mentally ill offenders in a problem-solving court who follow the rules will be able to avoid going to jail or prison. This opportunity is not something that is offered to those who have not been so identified. The criminal whose crime is not ascribed to some underlying pathological process is entirely out of luck. As a consequence of inordinate jurisprudential relativism, the value the justice system places on equal protection under the law is diminished.

This leads to the question whether there is something different about individuals who do not have mental health diagnoses that makes them less deserving of a more benevolent approach than that offered in the normal course of the criminal adjudication. Indeed, it is not at all apparent why those who are not mentally ill or addicted to drugs or struggling with anger management or some other perceived limitation should be excluded from the problem-solving-court approach to behavior modification. Perhaps a “bad judgment court” or a “lack of conscience court” or simply a “criminal not-otherwise-specified (NOS) court” would be appropriate. If the behavior of the mentally ill is the result of faulty neurobiology that can be rectified through the use of drugs, then it must be made clear how the fundamental etiology of any other kind of behavior, including the behavior of the emotionally-well-adjusted criminal, is any different. All other things being equal, there is no clear answer to why criminal behavior resulting solely from the exercise of bad judgment, or for that matter from just bad intentions, does not need the same kind of problem-solving approach. Embracing a treatment imperative only for certain individuals with specified characteristics raises important questions about what should be considered fair in a system of jurisprudence that has prided itself on its commitment to equality under the law.

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49 A PRIMER FOR POLICYMAKERS AND PRACTITIONERS, supra note 35, at 6 (suggesting that mental illness is not susceptible to change by an act of will and that the neurobiological nature of mental illness that leads to lack of self-control is more justly responded to by the problem-solving court approach).

necessary to give these questions our thoughtful, searching attention.

C. They Compromise the Traditional Role of the Court and the Judge

The hallmark of the American system of justice is the central role of the judge as an independent, fair, and impartial dispenser of justice. Impartiality is what every trial judge strives for, both in appearance and effect. The legal profession has long recognized the need for judges not to choose sides. In its Standards Relating to the Function of the Trial Judge, the American Bar Association recognized the compelling need for trial judges to maintain their neutrality:

51 “Representing the overriding social interest and charged with the obligation to do exact justice according to law, the judge, of course, is expected to be a neutral factor in the interplay of adversary forces.”

The Standards have set forth a succinct statement of the fundamental duty of the judge:

The trial judge should avoid impropriety and the appearance of impropriety in all activities, and should conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. The judge should not allow family, social, political or other relationships to influence judicial conduct or judgment.

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The Standards go so far as to note that, “[d]uring the course of official proceedings, the trial judge should avoid contact or familiarity with the defendant . . . .”

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These principles are strongly reinforced by codes of judicial conduct. For example, in Pennsylvania: “Judges should participate in establishing, maintaining and enforcing, and should themselves observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved.”

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In the problem-solving-court model the judge is no longer a detached overseer of the legal process, but rather a direct player in the correctional process. The judge becomes a member of a team whose mission is not the pursuit of justice per se, but to change the behavior of a person accused of, or more likely con-

51 Standards Relating to the Function of the Trial Judge 3 (Approved Draft 1972).
52 Id.
53 Standards for Criminal Justice: Special Functions of the Trial Judge § 6–1.6(a) (2000).
54 Standards for Criminal Justice: Special Functions of the Trial Judge § 6–1.6(b) (2000).
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victed of, a crime. As an active member of what is regarded as a therapeutic undertaking, the judge has a personal stake in the outcome of the change strategy the team has selected. In mental health courts the judge must require that the client follow a certain treatment regimen approved by the team or others and select the kinds of rewards or punishments that will be used to shape compliance. There is nothing about this role that would give to even the most casual observer the impression that the judge is standing above the fray and assuring that all the parties are simply playing by the rules. In the problem-solving court model the judge is every bit a stakeholder in the outcome of the treatment initiative. The judge’s direct participation in what is historically a corrections function creates a substantial risk that a model of judging will emerge that focuses on attached (rather than detached) involvement with litigants and creates in the minds of the public the perception that the judge’s role as impartial administrator of the rule of law for all concerned has been diminished.

Then of course there is the question as to whether a judge who is so enmeshed in the therapeutic undertaking can in any case be sufficiently objective to properly further the justice imperative. The mental health court process is in every sense an extension of the sentencing decision, and ultimately what happens there is determinative of the final outcome of the defendant’s criminal behavior. If the court fails its mission to change the defendant’s behavior in whatever way it set out to do, the next step will likely be incarceration. The question arises as to who should be the sentencing judge, and whether it should be the judicial therapist, who as part of the treatment team failed to accomplish the goals of the problem-solving court. There is a profound difference between being sentenced by a judge who knows a defendant only as a result of information provided in a pre-sentence report or from presiding over a plea of guilty or trial, and being sentenced by a judge who had been intensely invested in a defendant’s failed rehabilitation. When a judge has a significant relationship, professional or otherwise, with a person whose destiny he or she controls, a serious challenge to the quest for impartiality and objectivity is inherently present.

There is certainly nothing new about the need for judges to be removed from direct personal involvement in matters that come before them or may come before them. The plea bargaining process has long been recognized as a potential source of conflict between the practical advantages of having judges involved in facilitating agreement and the overall need to maintain impartiality and avoid coercion. This concern is exemplified by the position
taken by the American Bar Association, as set forth in its Standards for Criminal Justice, that “[a] judge should not ordinarily participate in plea negotiation discussions among the parties.” The idea of a judge directly involved in an informal process of negotiation that is inherently adversarial and that requires neutral judicial oversight to insure it comports with legal standards is problematic. However, the question remains whether the judge’s intense personal involvement in solving the personal problems of the individuals that he or she sentences is any less so.

In addition, at an entirely different level, the question arises as to the judge’s proper role in distribution of rewards or punishments, including jail, attendant to the treatment process. In particular, careful consideration needs to be given to the issue of whether a judge should be primarily concerned with what works in terms of effecting behavior change, rather than some broader notion of justice. It needs to be kept in mind that the goal of the problem-solving court is entirely pragmatic and has nothing to do with the distribution of justice. When the mental health court judge imposes a sanction it is not because the person deserves it, but rather because a successful therapeutic intervention requires it. Traditional legal theory has long focused on individual responsibility as the cornerstone of American criminal jurisprudence, and the well-established goals of sentencing dictated that judges accommodate a number of societal concerns in fashioning sentences. By having judges focus only on the pragmatic outcome of some kind of therapeutic strategy, it would appear that the nature of the sentencing decision and the judge’s role are materially changing. In my view, these are issues that require serious consideration before the bandwagon is allowed to pick up any more speed.

None of this is to suggest that the motives of mental health court judges are not anything but honorable. Indeed, quite the opposite. Judges who embrace the problem-solving court concept are likely to be well-intentioned and highly dedicated men and women who believe they are effectively helping society deal with very difficult problems. They believe they are doing good work by charting a more progressive—and perhaps even a more enlightened—course for a modern judiciary. In that regard they have been strongly encouraged and otherwise reinforced to do so by others, both within and without the justice system, who have a personal and professional stake in promoting the problem-solving court model. Indeed, there is now an entire bureaucracy that has

emerged to support the concept, and with it has come the customary compliment of employees, consultants, and designated spokespersons that have a deeply vested interest in its continued viability.

By entirely focusing on the immediate and often frustrating view from the bench, perhaps it would appear that there is nothing out of the ordinary, in both the legal and practical sense, going on. Looking at the bigger picture, however, yields a very different perspective. What is actually developing is a fundamental change in the role of the court and, more precisely, the role of the judge in a way that is inconsistent with traditional notions of judicial independence in a system that counts on it.

The idea often expressed in the literature and anecdotally is that judges should not just sit by and continue to do what is obviously failing. The implication is that it is the court’s role and responsibility to pick up the slack where others have failed. This, in my view, is profoundly misleading. First, because it erroneously suggests that there are readily available solutions to complicated personal and social problems like mental illness and drug addiction. Second, because it assumes that it is the court’s role to be the instrument of social change. Both of these positions are misguided. The notion that society should be turning to the court as the governmental entity responsible for creating social change is entirely antithetical to the court’s traditional role in criminal justice as the neutral and detached overseer and adjudicator of disputes between the government and its citizens. Its duty to distribute punishment is entirely ancillary to this function, not the essence of it. The courts neither define public policy nor affirm any policy other than what the rule of law requires.

In the end, using judges as therapeutic change agents ascribes to the court the responsibility, if not always the capacity, to shape social behavior by using a methodology intended to be effective but not necessarily fair. By utilizing the applied science of behavior modification, a problem-solving judge is embracing the notion that behavior is less a product of free will and individual responsibility than of environmental circumstances, among other factors. In that context, sanctions or other planned consequences are tools used to fix problems rather than convey the just desserts one has earned. In such circumstances, I suggest the need for neutral and dispassionate judicial oversight is more, rather than less, compelling. When the government says that its mission is to get people to improve their behavior by using any benevolent means that work, the door is opened to a new era of jurisprudential pragmatism. When the goal of the criminal pro-
cess is to “solve” social problems rather than adjudicate responsibility and punish wrongdoing the court becomes nothing more than a repair shop for bad behavior.

It may well come to pass that science will increasingly support the problem-solvers’ deterministic view of human behavior. However, the notion that the role of the judge is to be no more than a team player in pursuit of a social agenda leads one to ask who will be left to be the guardian of the rule of law and the independent check on arbitrary government action. Without judges performing this role, it is unclear who will be doing the “checking” as a part of the system of checks and balances to which we are so committed.

D. They Pose Potential Ethical and Professional Dilemmas for Judges

Judges who embrace the mental-health-court concept may also be putting themselves in a role for which they are ill-equipped. They are being asked to motivate mentally ill defendants to accept treatment as prescribed by someone, typically a psychiatrist, in the mental health system. It seems clear that a judge is not the best evaluator of whether the recommended treatment is the correct one. The practice of psychiatry and psychology is not akin to prescribing medication to cure a bacterial infection. As mentioned earlier, what exactly schizophrenia and bipolar disease are and what causes them is still largely a mystery. These are questions for which there are no certain answers. As noted above, diagnosing mental illness remains a highly subjective undertaking that rests heavily on judgment and a little on science.

One of the most fascinating features of both mental health and drug courts is that neither have standards for the effective treatment of what is thought to be an underlying-disease process. This is likely because for both addiction and mental illness, apart from a general suggestion that they are brain diseases, no one knows why exactly they develop in the first place. While there are numerous behavior-control drugs that have varying degrees of success, there is no medication or therapy that effectively addresses the cause of mental illness, at least a cause that is anything other than theoretical. Moreover, the issue of medication presents a particularly thorny dilemma for judges. While there can be no doubt that the use of drugs to treat mental illness is commonplace, their use remains controversial and their efficacy
may be more limited than judges realize. And although judges traditionally have no advanced training in psychology, psychiatry, or medicine in general, in the mental health court model they find themselves in a position to act as though they have extraordinary expertise. While this may be less of a concern if dealing with an enterprise characterized by scientific certainty, in the mental health arena, where differences in professional judgment can commonly be quite profound and the efficacy of drug therapy both remarkably uneven and little understood, it is a matter of serious consequence.

The literature of drug courts, where most academic attention has been devoted, barely even mentions the effectiveness of particular treatment strategies. It is not at all known why some drug court (and perhaps some mental health court) programs seem to be more successful than others. Assuming such knowledge exists, it must be determined how the trial judge, who has no specialized training in the relevant field, is to figure out whether the defendant should be taking drug “A” or “B” or “C” or none of them, or participating in therapy that is group or individual or nondirective or confrontational.

What is to be done if the treatment-selected modality, which use is reinforced by the court, fails or, more disturbingly, makes the person worse? Who will be responsible, and whether the defendant should be sanctioned because the treatment did not work, remain important questions. Since the assumption in mental health court is that mentally ill defendants have committed crimes only because their illness has gone untreated, it is unclear why a court would punish a person if the treatment does not work. Neither is it clear whose fault it is. I expect that the answer some would propose is that the treatment of mental illness, not unlike the treatment of cancer, while not as effective as we would like, is still worth trying. While this may be true from the mental health practitioner’s point of view, it raises the question as to whether a judge should be participating in making decisions of that kind and then punishing the defendant when his or her conduct falls short of what was expected.

From a somewhat different perspective, a similar concern is raised when the court in effect compels the treatment of individ-

57 Moncrieff & Cohen, supra note 36.
58 Of course, this will inevitably raise the question of personal liability for members of the judiciary who are engaged in activity outside of their traditional roles; a role that in almost all circumstances provides them with absolute immunity. It is not clear whether taking on the role of therapist, and all that implies in terms of prescribing and carrying out treatment measures for those thought to have an underlying disease process, would from a legal and public policy perspective warrant a different approach.
uals who are perhaps less likely to be able to make sound decisions. Keeping in mind that the premise of these courts is that mental illness is the reason these defendants committed their crimes in the first place, it seems reasonable to assume that at some level their judgment might be impaired and that their ability to make treatment decisions is compromised. In these circumstances it would seem that the mental health court judge would have a special responsibility to assure that, not only is the treatment correct, but that the defendant is capable of both consenting to it and following it. This would seem to be a function much more compatible with the traditional role of the judge as an impartial adjudicator than the role assigned to the judge as a therapeutic team member. 59

E. They Are Enablers of Mediocrity in the Delivery of Mental Health Services

There seem to be many attractive aspects of mental health courts from the point of view of the mental health system, none so much so as the courts’ willingness to force defendants into treatment. It can be surmised that the idea is that forced treatment is better than no treatment at all. In reality, the court is just doing what the mental health system has failed to do and should be able to do better. In this regard, mental health courts are enablers of mediocrity in the care and treatment of the mentally ill in the mental health system. They have taken the focus away from the need for quality mental health care that makes available a range of services and therapeutic responses including the need for residential care. So long as the court is willing to ameliorate the problem of jails overcrowded with mentally ill defendants often incarcerated for minor offenses, no one else will take on the responsibility—particularly those in other branches of government who are most able to successfully address the problem in the most comprehensive and effective way.

A FINAL COMMENT

It is easy to understand the emotional appeal of the therapeutic jurisprudence mantra. On the other hand, our shared experience—and hopefully our common sense—should tell us that jumping on-board social bandwagons too quickly could have very bad consequences for the very people that we intend to help. As such, when it comes to the search for solutions to significant and

59 This is particularly true when defense counsel has also joined the team together with the prosecutor. Under such circumstances, the customary tension inherent in the adversarial system that keeps the court focused on the rule of law is significantly lessened.
persistent behavioral problems, there should be more than just healthy skepticism of those who assert that they are the leaders of a new age of enlightenment. Only with a vigorous debate waged by informed participants and guided by adherence to the principles of true scientific inquiry can an accurate assessment emerge. Moreover, because these experiments may have serious and often unanticipated consequences for the participants, the stakes are high. Consequently, the burden of proof on those willing to take the risk must also be high.

As noted above, the zealous overselling of the rehabilitation model that was put forth in the 1960’s and 1970’s with every bit as much enthusiasm as is currently generated by the promoters of problem-solving courts may well have contributed to the proliferation of crime, and most certainly to the dramatic increase in the rate of incarceration. Social experimentation is always fraught with unforeseen consequences. While openly and enthusiastically putting forth new ideas in the hope of improving the administration of justice should be encouraged, it must be done in a way that promotes discussion and the kind of candid debate that assures a critical and searching analysis. Nothing less is required of those of us who are privileged to be a part of a profession that has prided itself on being among the most zealous guardians of our legal tradition.